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December 22, 1992

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-3
RM-7874 and RM-7958

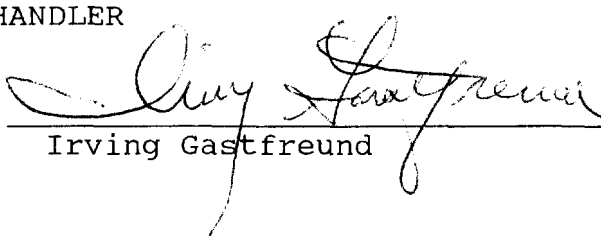
Dear Ms. Searcy:

Submitted herewith for filing, on behalf of our client, Schuyler H. Martin, permittee of Radio Station KPXA(FM), Sisters, Oregon, are an original and four copies of his Reply to Opposition to Petition For Reconsideration in the above-referenced proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &
HANDLER

By: 
Irving Gastfreund

Enclosures

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BEFORE THE
Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.203(b)) MM Docket No. 92-3
Of The Commission's Rules) RM-7874 and
Table of Allotments) RM-7958
FM Broadcast Stations)
(Prineville and Sisters, Oregon))

TO: Chief, Mass Media Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

SCHUYLER H. MARTIN ("Martin"), permittee of Radio Station KPXA(FM), Sisters, Oregon, by his attorneys, pursuant to Sections 1.106 and 1.45 of the Commission's Rules, hereby replies to the Opposition to Petition for Reconsideration filed in this proceeding on December 16, 1992, on behalf of the licensees of certain radio stations operating in the Bend, Oregon area (hereinafter collectively referred to as "Petitioners")¹. In support whereof, it is shown as follows:

1. On December 11, 1992, Martin filed with the Commission his Petition for Reconsideration in which he requested reconsideration and vacating of the November 24, 1992 action of the Mass Media Bureau in issuing a Public Notice (Report No.

¹ The Petitioners included the following broadcast licensees: Central Oregon Broadcasting, Inc. (licensee of KBND, Bend, Oregon; and KLRR, Redmond, Oregon); Redmond Broadcast Group, Inc. (licensee of KPRB and KSJJ, Redmond, Oregon); Highlakes Broadcasting Company (licensee of KRCO and KIJK-FM, Prineville, Oregon; JJP Broadcasting, Inc. (licensee of KQAK, Bend, Oregon); Oak Broadcasting, Inc. (licensee of KGRL and KXIQ, Bend, Oregon); Sequoia Communications (licensee of KICE, Bend, Oregon); and The Confederated Tribes of the Warm Springs Reservation of Oregon (licensee of KTWS, Bend, Oregon; and KTWI, Warm Springs, Oregon).

1920, Mimeo No. 30707) announcing the filing with the Commission on November 13, 1992, of the Petitioners' Petition for Reconsideration in this proceeding. Martin demonstrated, in his December 11, 1992 Petition, that the Mass Media Bureau's action of November 24, 1992, in reliance on the provisions of Section 1.429(e) of the Commission's Rules, could be viewed, in essence, as a determination by the Bureau that the Petitioners' November 13, 1992 Petition for Reconsideration in this proceeding had been timely filed. Thus viewed, the Bureau's November 24, 1992 action essentially constituted denial of Martin's November 18, 1992 Motion to Strike. Martin demonstrated that, to the extent that this is the import of the issuance of the November 24, 1992 Public Notice, such action by the Bureau was unreasoned, violates the provisions of the Administrative Procedure Act and applicable Commission Rules and policies and constituted agency action which is arbitrary, capricious and an abuse of discretion. Accordingly, Martin requested that the November 24, 1992 Public Notice be expeditiously rescinded as improvidently issued.

2. On December 16, 1992 the Petitioners filed their joint Opposition to Petition for Reconsideration. The Petitioners therein reiterated their meritless contention that their November 13, 1992 Petition for Reconsideration in this proceeding was not untimely. This issue need not be debated once again; suffice it to say that the manifest untimeliness of the Petitioners' Petition for Reconsideration has been clearly demonstrated by Martin in his November 18, 1992 Motion to Strike and in his

November 25, 1992 Reply to Opposition to Motion to Strike. These latter two pleadings are hereby incorporated herein by reference.

3. The Petitioners further contend that the Bureau's November 24, 1992 action did not adversely affect Martin. This claim borders on the frivolous: As shown by Martin in his December 11, 1992 Petition, the import of the Bureau's November 24, 1992 action is to constitute a determination by the Bureau that the Petitioners' Petition for Reconsideration in this proceeding was timely filed. Such a determination would in essence have constituted a denial of Martin's November 18, 1992 Motion to Strike albeit without any reasoned determination by the Bureau. Manifestly, any determination by the Bureau that the Petitioners' Petition for Reconsideration was timely filed would adversely affect Martin, since, under Section 1.420(f) of the Commission's Rules, the effectiveness of the Bureau's October 7, 1992 Report and Order, DA 92-1276, in this proceeding would have been automatically stayed by the timely filing of a Petition for Reconsideration. Any such stay effectively precludes Martin from implementing the upgrade of the KPXA(FM) technical facilities in the manner authorized in the Bureau's Report and Order. Since Martin is thus clearly adversely affected by the Bureau's November 24, 1992 action, the requirements of Section 1.106(b) of the Commission's Rules are met.

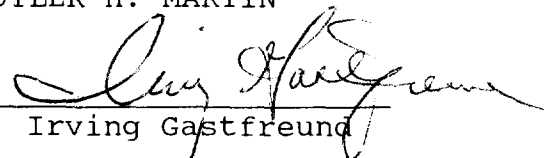
4. Finally, the Petitioners argue that the Bureau's action of November 24, 1992 was not a final action by the Bureau on any material issue in this case. This claim is also wholly lacking

in any merit. As noted above and in Martin's December 11, 1992 Petition, the import of the Bureau's November 24, 1992 action is to reach a determination on the ultimate issue of the timeliness vel non of the Petitioners' November 13, 1992 Petition for Reconsideration herein. Given the fact that Martin's November 18, 1992 Motion to Strike was before the Bureau at the time that it took its action of November 24, 1992, the Bureau's action, taken in express reliance on the provisions of Section 1.429(e) of the Commission's Rules, which applies only to timely filed petitions for reconsideration, must be viewed as arbitrary, capricious and an abuse of discretion.

5. For all of the foregoing reasons, the Bureau's action of November 24, 1992 should be expeditiously reconsidered and vacated. The November 24, 1992 Public Notice should be expeditiously rescinded as improvidently issued, and Martin's November 18, 1992 Motion to Strike and his November 19, 1992 Petition for Declaratory Ruling should be expeditiously granted for the reasons set forth therein.

Respectfully submitted,

SCHUYLER H. MARTIN

By: 
Irving Gastfreund

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His Attorneys

December 22, 1992
Doc 12078941

CERTIFICATE OF SERVICE

I, Toni R. Daluge, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that I have on this 22nd day of December, 1992, sent copies of the foregoing "Reply to Opposition To Petition For Reconsideration" by First-Class U.S. Mail, postage prepaid, or via hand-delivery, as indicated below, to the following:

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Toni R. Daluge

*/ Via Hand-Delivery